OAH Docket No. 8-2400-17520-1
Governor's Tracking No. AR 265

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF PUBLIC SAFETY
ARMER/911 Program

In the Matter of the Proposed Amendments to Rules Governing the Statewide 911 Emergency Telephone System, Minnesota Rules, Chapter 1215.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

Administrative Law Judge Eric L. Lipman conducted a hearing concerning the above rules beginning at 9:00 a.m. on December 12, 2006, in the First Floor Conference Room, League of Minnesota Cities, 145 University Avenue West, St. Paul, Minnesota. The hearing continued until all interested persons, groups and associations had an opportunity to be heard concerning the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.[1] The legislature has designed the rulemaking process to ensure that state agencies have met all of the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable; that they are within the agency's statutory authority; and that any modifications that the agency may have made after the proposed rules were initially published are within the scope of the matter that was originally announced.

The rulemaking process includes a hearing when a sufficient number of persons request that a hearing be held. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The Administrative Law Judge is employed by the Office of Administrative Hearings (OAH), an agency independent of the Department of Public Safety (Department).

The members of the Department's hearing panel were Ronald L. Whitehead, ARMER/911 Program Director; E. Joseph Newton, Program Administrator; Jim Beutelspacher, Program Manager; and Mary Kay Frisch, Program Analyst. Sixteen members of the public signed the hearing register and eight members of the public spoke at the hearing.

The Department received a number of written comments on the proposed rules before the hearing. After the hearing, the record remained open for five business days, until December 19, 2006, to allow interested persons and the Department an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five days to allow interested persons and the

[1] Minn. Stat. §§ 14.131 through 14.20.

Department the opportunity to file a written response to the comments submitted. The OAH hearing record closed on December 27, 2006. All of the comments received were read and considered.

SUMMARY OF CONCLUSIONS

The Department has established that it has the statutory authority to adopt the proposed rules and that the rules are necessary and reasonable.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Nature of the Proposed Rules

1. This rulemaking proceeding involves revising the rules governing the Statewide 911 Emergency Telephone System. Specifically, the proposed rules add definitions for Automatic Location Identification (ALI), Automatic Location Identification Database, Default Routing, 911 Service Provider, No Record Found (NRF), and Service Provider. Second, the proposed rules specify design standards for the coordination of trunked circuits needed to provide 911 service and determining default answering points for the routing of 911 calls where a "no record found" condition occurs. Finally, the proposed rules address operational requirements; such as establishing minimum accuracy standards for customer location information provided by telecommunication service providers to the ALI database, adding an ALI database reporting requirement for the 911 service providers, and requiring answering points to establish procedures for "no record found" 911 calls.

2. In recent years, as the telecommunications market has become significantly more complex and grown increasingly competitive, the system for handling 911 calls has grown and changed as well. When an individual places a 911 call, the caller's telephone number (Automatic Number Identification (ANI)) is displayed and routed from the local telephone exchange to a selective router. The selective router then uses the caller's phone number to determine to which Public Safety Answering Point (PSAP) the call should be directed. The caller's phone number is then used to query the ALI database, which in turn determines the caller's address. The address is then transmitted to the PSAP.[2]

3. Telecommunications service providers charge, and the state pays, a monthly fee for the timely and accurate provision of ALI information maintained in the ALI database.[3] A No Record Found (NRF) results when no ALI information is available for display at the PSAP. The call is then routed to a default trunk. The state is responsible for covering the cost of any default trunks that are needed to ensure that a 911 call is properly transmitted.

4. The Department maintains that the proposed rules are needed, in part, due to the high cost of maintaining the infrastructure of default trunks and the difficulty

[2] Ex. 17.
[3] Ex. 3 (SONAR) at 1.

of predicting the volume of NRF results that will occur in the future. In the view of the agency, the costs associated with maintaining accurate address data have not been assumed by many telecommunications providers, and, by permitting long lag times before this information is updated, have passed a share of their business costs on to State taxpayers.

5. In developing the proposed rules, the Department exchanged multiple drafts of the rule and engaged in extensive discussion with Qwest Communications, the company that would be impacted most by the proposed rule changes, as well as other telecommunications providers. During the course of these discussions, the Department and Qwest have reached agreement on a number of the rule provisions.

Procedural Requirements of Chapter 14

6. On February 13, 2006, the Department published a Request for Comments on Possible Amendments to Rules Governing the Statewide 911 Emergency Telephone System. The Request indicated that the Department was considering amending the rules to add definitions, design standards, operational requirements, and to manage the number of default routing trunks. The Request for Comments was published at 30 State Register 885-86.[4]

7. By letter dated September 14, 2006, the Department requested that the Office of Administrative Hearings schedule a hearing and assign an Administrative Law Judge. The Department also filed a proposed Dual Notice, a copy of the proposed rules, and a draft of the Statement of Need and Reasonableness (SONAR).[5]

8. In a letter dated September 22, 2006, Administrative Law Judge Eric L. Lipman approved the Department's Dual Notice and Additional Notice Plan.[6]

9. On September 28, 2006, the Department mailed the Dual Notice of Hearing to all persons and associations who had registered their names with the agency for the purpose of receiving such notice and to all persons identified in the additional notice plan. The Dual Notice stated that a copy of the proposed rules was attached to the notice.[7]

10. On September 28, 2006, the Department sent a copy of the Dual Notice and Statement of Need and Reasonableness to the legislators specified in Minn. Stat. § 14.116.[8]

11. On September 28, 2006, the Department mailed a copy of the Statement of Need and Reasonableness to the Legislative Reference Library.[9]

12. On October 9, 2006, the proposed rule and the Dual Notice of Hearing were published at 31 State Register 493.[10]

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[4] Ex. 1; Minn. Stat. § 14.101.
[5] Ex. 7.
[6] Ex. 7.
[7] Ex. 5.
[8] Ex. 11.
[9] Ex. 4.
[10] Ex. 5.

13. On the day of the hearing the following documents were placed in the record:

- The Request for Comments published February 13, 2006 at 30 SR 885 (Ex. 1a);
- Certificate of Mailing the Request for Comments (Ex. 1b);
- A copy of the proposed rule with Revisor's approval dated June 28, 2006 (Ex. 2);
- A copy of the Statement of Need and Reasonableness (SONAR) (Ex. 3);
- A copy of the transmittal letter showing the agency sent a copy of the SONAR to the Legislative Reference Library and Certificate of Mailing (Ex. 4);
- The Dual Notice of Hearing as mailed and as published in the State Register at 31 SR 493 (Ex. 5);
- Certificate of Mailing the Dual Notice of Hearing to the Rulemaking Mailing List dated September 28, 2006, and Certificate of Accuracy of the Mailing List (Ex. 6);
- Copy of letter from OAH approving Additional Notice Plan and copy of agency's letter to OAH to schedule hearing and for approval of Additional Notice Plan (Ex. 7);
- Notice of Hearing to those who requested a hearing (letter, certificate of mailing, and mailing list) (Ex. 8);
- Written comments on the proposed rules received by the agency during the comment period (Exs. 9-9j);
- Copy of approval letter from Commissioner of Finance and copy of agency letter to Finance requesting approval under Minn. Stat. § 14.131 (Ex. 10);
- Copy of letter to legislators dated September 28, 2006 (Ex. 11);
- Copy of email approval from the Governor's office, letter to Governor's office, and proposed rule and SONAR form (Ex. 12);
- Copy of letter of approval from Commissioner of the Department (Ex. 13);
- Minnesota Rules, chapter 1215 (Ex. 14);
- Minnesota Statutes, chapter 403 (Ex. 15);
- Edits to the proposed rule after publication in the State Register (Ex. 16);
- Basic 9-1-1 Service handout (Ex. 17);
- Bar graphs of metro region telephone companies compliant and non-compliant with NRF standard (Ex. 18);
- 911 Agreement Among the Metropolitan Emergency Services Board, the State of Minnesota, and a telephone company (Ex. 19);

- Post-Hearing Comments of the Department (Ex. 20);
- Written comments from the public received during the post-hearing comment period (Exs. 21-24); and
- *Certificate of Giving Additional Notice Pursuant to Additional Notice Plan dated September 19, 2006.*

Additional Notice

14. Minnesota Statutes §§ 14.131 and 14.23, require that the SONAR contain a description of the Department's efforts to provide additional notice to persons who may be affected by the proposed rules. The Department submitted an additional notice plan to the Office of Administrative Hearings, which reviewed and approved it by letter dated September 22, 2006. In addition to notifying those persons on the Department's rulemaking list, the Department represented that it would also provide notice to the following groups and individuals:

- by mail, all Incumbent Local Exchange Carriers (ILECs), Competitive Local Exchange Carriers (CLECs), and 911 service providers approved by the Minnesota Public Utilities Commission to operate in the State of Minnesota;
- by email, all ILEC, CLEC, and wireless telecommunication services that routinely contract with the statewide 911 program; and
- by email and newsletter, all Public Safety Answering Points (PSAPs).

15. The Administrative Law Judge finds that the Department did give notice to those individuals contained in its Additional Notice Plan on September 28, 2006. But the Department failed to submit a Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan into the record at the hearing as required by Minn. R. 1400.2220, subp. 1, item H. This is a procedural defect in the rules. The Administrative Law Judge finds, however, that this was a harmless error under Minn. Stat. § 14.26, subd. (3)(d)(1), because no individual was deprived of the opportunity to participate in the rulemaking.

Statutory Authorization

16. The Department is authorized to adopt these rules pursuant to Minn. Stat. § 403.07, subd. 1, as follows:

> The commissioner shall establish and adopt in accordance with chapter 14, rules for the administration of this chapter and for the development of 911 systems in the state including:
>
> (1) design standards for 911 systems incorporating the standards adopted pursuant to subdivision 2 for the seven-county metropolitan area; and
>
> (2) a procedure for determining ad evaluating requests for variations from the established design standards.

17. The Administrative Law Judge finds that the Department has the statutory authority to adopt the proposed rules.

Regulatory Analysis in the SONAR

18. The Administrative Procedure Act requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness. The first factor requires:

> **(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

The Department states that ILECs, CLECs, wireless carriers, and other service communication service providers will be affected by the rules because this class represents the data providers who provide subscriber information and other emergency response information for the ALI database.[11] This group is currently, and will continue to be, reimbursed for their cost of providing ALI information in an accurate and consistent format. There will be no additional costs associated with the implementation of this rule for this group.

The second class affected by these proposed rules is 911 service providers. This class represents ALI and selective router service providers who receive subscriber and emergency response information from ILECs, CLECs, and wireless carriers.[12] They are reimbursed for their cost of maintaining this information on a per entry basis. Qwest Communication and Independent Emergency Services are the two companies in Minnesota currently maintaining this information. The proposed rules may require minor adjustments to the policies and procedures governing these two companies. A new requirement of these proposed rules is an annual report of NRF and ANI failures to the commissioner of public safety, which need not be extensive or costly according to the Department.

The third class affected by these proposed rules is PSAPs, the public safety agencies to which 911 calls are originally routed. The proposed rule requires PSAPs to promulgate a policy for handling NRF 911 calls, but it is anticipated that all PSAPs already have formal or informal procedures on this subject in place.[13] Additionally, the assignment of default PSAPs and reduction in default trunks imposed by this rule may result in a very small increase in calls to a few designated default PSAPs.

Finally, the Department states that the public will benefit from these proposed rules because the routing of 911 calls for emergency services will be more accurate.[14]

[11] SONAR at 2.
[12] SONAR at 3.
[13] SONAR at 3.
[14] SONAR at 3-4.

(2) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The proposed rule will require the Department to monitor compliance by communication service providers. Based upon experience in the metropolitan area, the Department anticipates that most telephone companies are meeting the standards in the proposed rule. The Department estimates that the cost of collecting information annually from 911 service providers and of notifying non-compliant phone companies will be minimal and easily absorbed by the program.[15] The overall reduction of default trunks will save the state money. Also, the Department notes that the Public Utilities Commission may be affected by these proposed rules because the Commission regulates telecommunication service providers; however, the Department does not anticipate there will be significant costs associated with any new Commissioner activity.

(3) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

The Department states that the only less costly and less intrusive method of maintaining 911 service is to maintain the *status quo* – a matter that imposes a substantial burden on the state to maintain an extensive network of default trunks.[16]

(4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

The Department considered incorporating the proposed standards into the contracts for 911 services that it has with each telephone company, 911 service provider, and county.[17] Yet the Department has over 800 such contracts. It was determined that negotiating standards with each entity was impractical. The Department insists that the establishment of uniform standards among the different elements of the 911 system is necessary to ensure a coordinated effort to address the accuracy of the ALI database and the reporting of errors.[18]

(5) The probable costs of complying with the proposed rules.

The Department estimates that the cost of complying with the proposed rules is essentially the cost of reporting accurate results to the Department, a matter that Minnesota's telephone companies already strive to do.[19]

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[15] SONAR at 4.
[16] SONAR at 4-5.
[17] SONAR at 5.
[18] SONAR at 5.
[19] SONAR at 5. *See also* the discussion of regulatory factors 1 and 2, above.

(6) the probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

The Department states that the lack of database standards with uniform reporting requirements precludes the appropriate monitoring of the accuracy of ALI database information, which directly affects the reliable routing of 911 calls to an appropriate PSAP and the provision of accurate subscriber and emergency response information.[20] Failure to implement uniform reporting requirements for the ALI database would result in the state continuing to implement default trunks on a county by county basis in the face of a rapidly expanding and competitive telecommunications market.[21]

(7) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

The Federal Communications Commission (FCC) already requires telecommunication service providers to connect 911 calls to the appropriate PSAP.[22] While the FCC does not provide any particular database standards, the federal regulations are consistent with these proposed rules.[23]

Performance Based Rules

19. The Administrative Procedure Act[24] also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[25]

20. The Department states that the proposed rules are based on standards adopted and maintained by the Metropolitan Emergency Services Board (MESB) for 911 service in the seven-county metro area, which have been shown to be reasonably achievable and which have reduced the default routing network in the metro area.[26]

Consultation with the Commissioner of Finance

21. Under Minn. Stat. § 14.131, the Agency is also required to "consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

[20] SONAR at 5.
[21] SONAR at 6.
[22] 47 C.F.R. § 64.706.
[23] SONAR at 6.
[24] Minn. Stat. § 14.131.
[25] Minn. Stat. § 14.002.
[26] SONAR at 6.

22. The Department consulted with its Department of Finance representative Norman Foster by letter dated July 19, 2006.[27] In a memorandum dated July 24, 2006, Mr. Foster wrote:

> The proposed rule changes will affect local governments insofar as they operate Public Safety Answering Points (PSAPs). These PSAPs will, by the proposed rules, have to document their processes for handling calls when no record is found in the statewide ALI database. This formal requirement for documenting an existing issue with no record found calls should result in a relatively small or no fiscal impact to the affected local governments. These PSAPs should also benefit from the reduction in no record found calls that the overall rule changes are intended to accomplish.[28]

23. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

Analysis Under Minn. Stat. § 14.127

24. Effective July 1, 2005, under Minn. Stat. § 14.127, the Department must "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees."[29] The Department must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[30]

25. The Department has determined that the cost of complying with the proposed rules in the first year after they take effect will not exceed $25,000 for any one small business or small city.[31] ILECs, CLECs, wireless carriers, and other communication service providers are paid a monthly fee by the state to provide the required information. As discussed in the regulatory factors above, the Department argues that the new requirements of the proposed rules will result in minimal costs to the regulated parties.

26. The Administrative Law Judge finds that the agency has made the determination required by Minn. Stat. § 14.127 and approves that determination.

Rulemaking Legal Standards

27. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, a determination must be made in a rulemaking proceeding as to whether the agency has

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[27] Ex. 10.
[28] Ex. 10; *see also* SONAR at 7.
[29] Minn. Stat. § 14.127, subd. 1 (2005).
[30] Minn. Stat. § 14.127, subd. 2 (2005).
[31] SONAR at 7-8.

established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.[32] The Department prepared a Statement of Need and Reasonableness (SONAR) in support of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by Department representatives at the public hearing and in written post-hearing submissions.

28. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[33] An arbitrary or unreasonable agency action is an action without consideration of the facts and circumstances of the case.[34] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[35]

29. The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[36] An agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach because this would invade the policy-making discretion delegated to the agency by the Legislature. The question is rather whether the choice made by the agency is one that a rational person could have made.[37]

30. In addition to need and reasonableness, the Administrative Law Judge must also assess other factors; namely: whether the agency has complied with rule adoption procedures; whether the rule grants undue discretion; whether the Department has statutory authority to adopt the rule; whether the rule is unconstitutional or illegal; whether the rule constitutes an undue delegation of authority to another entity; or whether the proposed language is not a rule.[38]

31. In this matter, the Department has proposed some changes to the rule language after publication in the State Register. Thus, the Administrative Law Judge must also determine if the new language is substantially different from that which was originally proposed.[39]

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[32] *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).
[33] In re *Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 43 N.W.2d 281, 284 (Minn. 1950).
[34] *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).
[35] *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).
[36] *Manufactured Housing Institute*, 347 N.W.2d at 244.
[37] *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233, 63 S. Ct. 589, 598 (1943).
[38] Minn. R. 1400.2100.
[39] Minn. Stat. § 14.15, subd. 3 (2006).

32. The standards to determine if new language is substantially different are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced … in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the … notice of hearing and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question."

33. In determining whether modifications make the rules substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have understood that the rulemaking proceeding … could affect their interests," whether "the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the … notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the … notice of hearing."[40]

34. Any substantive language that differs from the rule as published in the *State Register* has been assessed to determine whether the language is substantially different. Because some of the changes are not weighty or controversial, they are not separately set forth below. Any change not discussed is found to be not substantially different from the rule as published in the *State Register*.

Analysis of the Proposed Rules

General

35. This report is limited to discussion of the portions of the proposed rules that received significant comment or otherwise require a detailed examination. When rules are adequately supported by the SONAR or the Department's oral or written comments, a detailed discussion of the proposed rules is unnecessary. The agency has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report by an affirmative presentation of facts. All provisions not specifically discussed are authorized by statute and there are no other deficiencies that would prevent the adoption of the rules.

Discussion of Proposed Rules by Topic

1215.0200 – Definitions

Subpart 1a. Automatic location identification (ALI)
Subpart 4a. 911 service provider
Subpart 8a. Service provider

36. The Department is proposing to add definitions for ALI, 911 service provider, and service provider. The addition of these terms and their definitions is essential to the application of the proposed rules. The ALI definition is identical to the definition contained in Minn. Stat. § 403.02, subd. 7.

[40] Minn. Stat. § 14.05, subd. 2.

37. Embarq Minnesota, Inc. (Embarq) objected to the Department's chosen language for each of the three definitions. Embarq argued that the Department should instead use the language defining these terms found in the National Emergency Number Association (NENA) Master Glossary of 9-1-1 Terminology.[41] This glossary is an industry standard published to provide a consistent definition for all 911 terms across the industry. Embarq asserts that the adoption of language that differs from the NENA standards will create confusion in the industry.

38. The Department defends the proposed ALI definition by reiterating that it is identical to the language in the Minnesota Statutes and that any difference between the two definitions will run contrary to statute. The Department is silent as to further justification for the 911 service provider and service provider definitions. At the hearing, the Department panel did admit that these two subparts could be confused with each other.

39. While the Administrative Law Judge agrees that there could be potential for some confusion in the terminology of subparts 4a and 8a, the Department has demonstrated that the proposed language is needed and reasonable. Similarly, regarding subpart 1a, the Department has shown a rational basis for the proposed language defining ALI.

1215.0800 – Design Standards

40. **Subpart 6. Default routing.** The proposed language mandates that the Commissioner of Public Safety determine the number of trunked circuits and designated default PSAP for routing 911 calls from each service provider. The proposed rule then sets out the factors that the Commissioner must consider in making the determination.

41. Embarq expressed concern that this requirement may create "an unnecessary level of operational bureaucracy in determining public safety network requirements," which in turn will impede the development of the 911 network.[42]

42. The Administrative Law Judge finds that the proposed language of subpart 6 is needed and reasonable. The Department has set forth language that focuses the Commissioner's decision-making and does not allow for unbridled discretion. The proposed language is approved.

43. Based upon the comments received prior to the hearing from the Metropolitan Emergency Services Board (MESB) and the Minnesota Sheriffs' Association, the Department agreed to add an element to subpart 6, item B as follows: <u>(5) consider the PSAP's ability to deal with default calls originating for another jurisdiction.</u>

44. The Administrative Law Judge finds that the additional language under item B is needed and reasonable, is a logical outgrowth of the rules as proposed, and does not make the rules substantially different.

[41] Ex. 21. Embarq also argues that the ANI definition should mirror the NENA Glossary. The proposed amendment to the ANI definition, however, is merely technical in nature, and the definition of the term is not a part of this rulemaking.
[42] Ex. 21.

1215.0900 – Operational Requirements

45. **Subpart 11(A). ALI database standards.** This subpart sets forth the accuracy standard for each communication service provider. "A service provider shall provide accurate data to the 911 automatic location identification database with no more than 0.5 percent of all calls received by the 911 network during any calendar year resulting in a no record found (NRF) condition." The proposed rules then go on to provide for six instances in which an NRF call would not be attributed to a service provider during the course of a calendar year. The Department states that the 0.5 percent standard is needed to promote the accuracy of the 911 network and reasonable because it is based on a similar standard used by the MESB in the metro area since 1996.[43]

46. The 911 Service Director of the MESB testified that compliance with the 0.5 percent standard in the metro area between 2002 and 2005 has increased from 0.52% to 0.42% when all telephone companies and all 911 calls are considered. Similarly, the MESB offered further support of the proposed accuracy standard by noting that the number of telephone companies achieving compliance with the 0.5 NRF standard rose from 5 of 26 companies in 2002, to 15 of 31 companies in 2005.[44]

47. Qwest objected to the new standard, arguing that the Department failed to demonstrate the need for and reasonableness of the language. Qwest asserts that the Department's discussion in the SONAR falls short of a legally sufficient analysis under Minn. Stat. § 14.131.[45] The company argues that Minnesota law and rule require that no rule be enacted unless there has been a careful study of the achievability of the standard and the associated costs and benefits and that no such study was completed in this instance. Qwest suggests that the Department's reliance on MESB's use of the 0.5 percent standard is misplaced because the MESB separately negotiates the applicable standard with each of the service providers with which it contracts.[46]

48. Furthermore, Qwest argues that the evidence presented at the hearing does not demonstrate achievability because only 15 of 31 telephone companies met the 0.5 percent standard in 2005. Qwest objects to the fact that there has been no study into the reasons that service providers fail to meet the standard, by what margin they are failing to meet the standard, and the costs that might be incurred to meet the standard.[47]

49. At the hearing, there was an inquiry from the Administrative Law Judge as to how and why NRFs occur. Qwest elaborated upon this discussion in its post-hearing comments, citing four main ways in which an NRF can result.[48] First, ANI failures are caused by the network's failure to transmit the full ten-digit telephone number. According to Qwest, there is nothing that a service provider can do to prevent an ANI failure. Second, an NRF can occur where a new customer's telephone service is turned

[43] Testimony of Peter Eggimann; Ex. 20, p. 6.
[44] Ex. 22.
[45] Ex. 23, p. 4.
[46] Ex. 23, p. 5.
[47] Ex. 23, p. 6.
[48] Ex. 23.

on, but the customer's complete 911 information has not yet been transmitted to the 911 database. The third situation where an NRF can occur is when the telephone number does not match the Master Street Address Guide (MSAG). This type of error results when the MSAG has not been updated to reflect the addition of new homes in new construction areas. Qwest argues that the updating of the MSAG is a local responsibility and not within the control of the service provider. Finally, the fourth situation in which an NRF occurs is where the service provider submits incorrect information to the 911 database. Such errors are wholly within the control of the service provider.[49] Qwest maintains that it is unfair to impose the 0.5 percent NRF standard on service providers when those providers only have control over one of the four means by which an NRF occurs.

50. Onvoy, Inc., a CLEC that provides service to businesses via Voice over Internet Protocol (VoIP), also objects to the Department's proposed standard. Onvoy admits that despite its best efforts, it has been unable to meet the 0.5 percent standard over the last few years. Onvoy attributes its failure to meet the standard to three causes: 1) the small number of 911 calls placed by its customers; 2) the "churn" associated with the telecommunications industry, particularly when ported numbers and additional new numbers are being provided to a customer; and 3) misdialed or test 911 calls. Onvoy suggests that the standard is "arbitrary and onerous and offered without evidence of its efficacy and without evidence that a less onerous standard cannot be safely applied."[50]

51. The Department responded directly to one of Onvoy's concerns by amending subpart 11, clause A(2)(b), one of the six instances in which an NRF call would not be attributed to a service provider during the course of a calendar year, as follows:

> (b) for 911 calls received from a telephone installed less than ~~one~~ two full business days, which includes each weekday except a legal holiday, following the date of installation.

52. In general, the Department believes that it has accounted for the concerns of Qwest and Onvoy, and that it has given affected parties more than ample opportunity to comment of the proposed rules. Particularly, the Department notes the comments of Nancy Pollock, the Executive Director of the MESB, that compliance with the standard requires attention to internal business processes, but that generally service providers are able to meet the standard.[51] The Department admits that Minnesota is the only state in the nation to thus far attempt to promulgate this type of standard. Yet the Department asserts that the public's safety obliges the new standards.

53. The Department has established that the proposed rule is needed and reasonable. This is a choice that is legitimately within the agency's policy-making discretion and emphasizes public safety. The amendment to subpart 11, clause A(2)(b) attempts to address the concerns of Onvoy, is needed and reasonable, and does not make the rule substantially different than published in the State Register.

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[49] Ex. 23, p. 7.
[50] Ex. 24, p. 2.
[51] Testimony of Nancy Pollock; Ex. 20, p. 5.

Potential Penalties for Non-Compliance with 0.5 Percent Standard

54. The possible penalties for failure to comply with the new proposed standard was an issue both prior to and at the hearing. Qwest, the service provider that will be most affected by the proposed rules, queried the Department about the consequences of non-compliance. Specifically, Qwest expressed a concern that the Department would withdraw funding for default trunks if Qwest did not meet the standard.[52] Several other interested parties also noted their concern about the potential penalties for failure to meet the standard.[53]

55. The Department stated that it did not want to include a penalty in the proposed rules because it wants the process to be a cooperative one.[54] In a memo dated October 13, 2006, the Department put forth a list of how it might address a telephone company with database management problems.[55] First, the Department stated that it would give the phone company a notice of non-compliance. Next, the Department would request a meeting with representatives of the phone company and request a reconciliation of the company telephone numbers to determine the extent of the problem and a written action plan from the phone company for resolution of the underlying database management problems. The Department would then monitor the company's compliance with its plan over the next year asking the 911 service providers to provide the Department with periodic reports. In the event a phone company refused to address the database management problem, the Department might then ask the Public Utilities Commission to take action, such as terminating the company's certificate of authority. Other possible consequences include requiring the phone company to install additional trunks at its own expense or pursuing a breach of contract claim in court.[56]

56. The Department's decision not to include penalty language – presumably deferring until another day development of a detailed set of procedures – does not render these rules defective. When an agency exercises the "legislative functions" that have been delegated to it, reviewing tribunals will uphold the agency's choices as to which topics it will address, and in what sequence, unless those choices are unjust, unreasonable or discriminatory.[57] In this proceeding, even if it is assumed that the service providers in Minnesota would find penalty provisions helpful and instructive, the record does not support the claim that without this detail the promulgation of operational standards for 911 service is unjust, unreasonable or discriminatory. For this reason, as noted earlier in Finding 53, Minn. R. 1215.0900, subpart 11(A) is needed and reasonable.

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[52] Testimony of Joan Peterson.
[53] Exs. 9h and 21.
[54] Testimony of Ronald Whitehead.
[55] Ex. 9.
[56] Ex. 9.
[57] *Compare, e.g., In the Matter of the Petition of Northern States Power Company for Authority to Change its Schedule of Rates for Electric Service in Minnesota*, 416 N.W.2d 719, 723 (Minn. 1987); *St. Paul Area Chamber of Commerce v. Minnesota Pub. Serv. Comm'n.*, 251 N.W.2d 350, 358 (Minn. 1977).

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Department of Public Safety gave proper notice of the hearing in this matter.

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule, with the exception noted in Finding 15, which was found to be harmless error.

3. The Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii).

4. The Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2, and 14.50 (iii).

5. The modifications to the proposed rules that were offered by the Department after publication in the State Register do not make the rules substantially different from the proposed rule within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

6. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

7. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted.

Dated this 26th day of January 2007.

s/Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

NOTICE

The Department must make this Report available for review by anyone who wishes to review it for at least five working days before the Department takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Department makes changes in the rules other than those recommended in this report, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Department of Health must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, she will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Department, and the Department will notify those persons who requested to be informed of their filing.